**U.S. Department of Labor**

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

**Issue Date: 30 December 2002**

CASE NO.: 2002-STA-00001

In the Matter of

**ADRIAN R. SCOTT**

Complainant

v.

**J. B. HUNT TRANSPORT SERVICES, INC.**

Respondent

Appearances: Adrian R. Scott, Pro Se; Andrew P. Marks, Esquire, For Respondent

Before: Robert D. Kaplan
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

## I. JURISDICTION

This proceeding involves a complaint filed under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the "Act"), as amended, 49 U.S.C. § 31105 (formerly 49 U.S.C. § 2305), and its implementing regulations, 29 C.F.R. Part 1978. The complaint filed with the Secretary of Labor alleges that J. B. Hunt Transport Services, Inc. (hereinafter "Respondent" or "J. B. Hunt") discharged Complainant from his job as a truck driver in violation of the Act. The Act protects employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules.

## II. PROCEDURAL HISTORY

Complainant was hired by J.B. Hunt as a long-distance truck (tractor-trailer) driver on October 28, 1999, and his employment ended six weeks later on December 8 or 10, 1999. On May 17, 2000, Complainant filed a timely complaint with the Occupational Safety and Health Administration ("OSHA"). OSHA investigated the complaint on behalf of the Secretary of Labor. On August 31, 2001, the OSHA Deputy Regional Administrator issued Secretary's Findings in which the complaint was found to be without merit and was dismissed. (ALJ 1) On September 30, 2001,

Complainant timely objected to the Secretary's Findings and requested a hearing, pursuant to 29 C.F.R. §§ 24.5(d) and 24.6. (ALJ 2)[1]

A hearing was held before me in Cherry Hill, New Jersey on May 20-22 and 29, 2002, at which the parties had full opportunity to present evidence and argument. Respondent and Complainant filed post-hearing briefs on October 15 and 24, 2002, respectively. Complainant filed a response brief on November 29, 2002.

## III. THE PARTIES' CONTENTIONS

Complainant maintains that on or about November 16-18, and December 6-10, 1999 Respondent required to him drive a vehicle in excess of the 10-hour limit (the "10-hour rule"), while he was fatigued, and despite Respondent's failure to perform a "B-service" safety inspection of the vehicle. (Complainant's Brief, pp. 13, 23-26) These allegations relate to federal safety regulations for the trucking industry at 49 C.F.R. §§ 395.3, 392.3, and 396.3, respectively. Complainant alleges that Respondent terminated his employment because he complained about violations of the safety regulations and because he refused to operate the vehicle while these violations existed. (Complainant's Brief, pp. 24-25)

Respondent asserts that it did not direct or knowingly permit Complainant to operate the vehicle in an unsafe manner or condition. (Respondent's Brief, p. 2) Respondent further posits that it took no action to terminate Complainant's employment, and that Complainant was not either actually or construc-tively discharged. Rather, Respondent states, Complainant voluntarily quit on December 10, 1999. (Respondent's Brief, pp. 2-3, 23-24)

## IV. ISSUES

The following issues are presented for adjudication:

1. Whether Complainant engaged in protected activity in that he complained of safety violations and refused to drive because of the violations.

2. If so, whether Complainant was directly or constructively discharged because of these complaints and actions, and Respondent thereby violated the Act.

3. If so, what is the appropriate remedy.

---

[1]The following abbreviations are used: "RX" refers to the Respondent's exhibits; "CX" refers to the Complainant's exhibits; "ALJ" refers to procedural documents which I have made part of the record; "T" refers to the transcript of the hearing in May, 2002.

## V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is a motor carrier engaged in commercial motor vehicle operations. (T 11) Respondent does not controvert that the parties come within the jurisdiction of the Act. Based on the record, I so find.

Complainant was hired by Respondent on October 28, 1999 and subsequently assigned to its terminal in Baltimore, Maryland. Complainant had requested assignment to a J.B. Hunt terminal convenient to his home in Phoenix, Arizona, and was told that he would be transferred to Phoenix when a new J.B. Hunt terminal there opened. It appears that, consequently, at that time Complainant temporarily moved to the Baltimore area. For a variety of reasons, Complainant did not begin driving for Respondent until November 5, 1999. (T 25-43)

### A. J.B. Hunt Operations at its Baltimore Terminal

Each truck driver who works out of the Baltimore terminal is assigned to one of the several Fleet Managers located there. The Fleet Managers are supervised by an Operations Manager. (CX 5) Each Fleet Manager is responsible for 40 or 50 truck drivers and are the direct link between J. B. Hunt and its drivers. If a driver anticipates having a problem completing an assignment or cannot complete an assignment for safety reasons, the driver must contact the Fleet Manager by telephone or by the computers that are in each truck ("on-board" computers or "OBC"). (T 854, 1140) Fleet Managers are responsible for assisting drivers while the drivers are on the road. (CX 5, p. 64) Drivers also must put in requests for time off with the Fleet Manager. Tori Horner, who was located at the Baltimore terminal, was Complainant's Fleet Manager. Horner's supervisor was Ed Pfennig, the Operations Manager located at Respondent's East Brunswick, New Jersey office. Pfennig was responsible for supervising Fleet Managers at terminals in Maine, Massachusetts, and New Jersey, as well as Maryland. (T 884)

Respondent's Logistics Office (or "Logistics") located in its corporate headquarters in Lowell, Arkansas, determines what loads are to be picked up or delivered by J. B. Hunt's drivers nationwide. These assignments are called dispatches or "preplans." After the Logistics Office assigns a preplan to a driver, it notifies the Fleet Manager who in turn notifies and "dispatches" the driver via OBC. The preplans are usually sent to drivers shortly after they arrive at a delivery destination or while the truck is unloading. The preplan contains descriptions of the drivers' next pickup location, the next delivery location, a driving route and locations to stop for fueling. (T 896-900; CX 5, p. 65) Although preplans dictate much of the driver's route, each driver is the "captain of his ship" in that he or she can determine when to rest and when to drive. Drivers must report any potential problem or safety concern to the Fleet Manager within two hours after receiving a preplan. Although Fleet Managers do not create and assign preplans, they work with Logistics to adjust preplans because of safety concerns. (T 896-900, 956-958, 1204)

The OBC has a keyboard, and the drivers are thereby able to send messages to and receive messages from the Baltimore terminal and the Logistics Office. Fleet Managers use the OBC to

contact drivers every morning to ask about the driver's status and to provide general information about road conditions. As noted, drivers and Fleet Managers may also communicate with each other by telephone. (RX 1; CX 5) OBC messages show the date, time and approximate location of the vehicle at the time the message was sent. (T 661-670)

Respondent's truck drivers are paid for each mile they drive. (CX 14) J. B. Hunt does not require drivers to drive 10 hours and break for eight hours. Respondent allows drivers to choose what driving and resting periods they believe are best for themselves. However, the 10 hours of driving and eight hours of rest schedule maximizes driving time and, hence, income for the drivers. Therefore most drivers operate in this fashion. Respondent's trucks are equipped with sleeper berths in which the drivers can sleep during breaks. (T 474-475, 489) To help maximize driving time and reduce down time, a driver who is delayed at a shipper or a receiver can seek assistance from Respondent's Detention Center, located at the Arkansas headquarters. The Detention Center then contacts the shipper or receiver in an attempt to speed up the loading or unloading operation so that the driver can resume driving. (CX 5; T 108)

Drivers report the driving hours available to them under the federal regulations to Logistics and Fleet Managers over the OBC. Drivers must accurately record their hours and report estimated availability so that Logistics can accurately determine the driver's availability and create subsequent appropriate preplans for him or her. In formulating preplans, Logistics relies on a driver's OBC report of the driving hours available to the driver. (CX 5, p. 56) Drivers are also required to maintain daily logs that accurately show their driving time (time spent driving), duty time (time spent doing non-driving work), off-duty time, and sleeper-berth time. The logs are turned in weekly to Respondent's Compliance Office located at corporate headquarters in Arkansas. (T 473-475) The Compliance Office searches for violations of maximum-hours rules by computer-scanning the drivers' logs. (T 476) Violation of the maximum-hours limit or submission of a false log is cause for discipline. After two violations, a warning is issued to the driver; three violations results in a one-week suspension without pay; a fourth violation results in termination of employment. (CX 5, pp. 22-26)

Respondent is also able to monitor trucks and driving activity by a satellite monitor called an "OBC locator." Several times each hour, the OBC in each truck sends a signal to the satellite, and the time and location of the truck at that moment are recorded. However, in order to understand the activities of a driver, the Compliance Office relies primarily on driver logs rather than the OBC locator records. The Compliance Office does not review the OBC locator records unless it is aware of a reason to do so. (T 486-489)

## B. Complainant's Allegations of Discrimination

Complainant contends that he engaged in protected activity relating to the regulations at 49 C.F.R. §§ 395.3, 392.3, and 396.3 on November 18-19 and December 8-10, 1999, when he

communicated to Respondent his safety concerns or complaints and, ultimately, refused to drive. (Complainant's Brief, pp. 23-24)[2]

1. Events of November 16-19, 1999

Complainant testified that on November 16, 1999, he was reprimanded by Horner for leaving a loaded truck (i.e., tractor-trailer) at the Baltimore terminal without her permission. (T 80) During their discussion, Complainant told Horner that "nothing that you have said to me has been working out," and Complainant mentioned that he was dissatisfied with how loads were being assigned to him. Complainant also told Horner that he was "not getting any rest." (T 81)

Complainant testified that later that day he received a dispatch for a shipment going from Wilmington, Delaware to Lancaster, Pennsylvania. (T 89) After completing delivery of this shipment on November 16, at 5:09 p.m., Complainant was given his next dispatch. This shipment was planned to go from Lancaster, Pennsylvania to Dickson, Tennessee. (T 90) Complainant started driving to Dickson, Tennessee at approximately 9:44 p.m. on November 16. (T 90-91; RX 1, p. 34) On the morning of November 17, while in route, Complainant telephoned Horner from a location on the Pennsylvania Turnpike. Complainant testified that he told Horner that he was spending too much time at shippers and it was affecting his hours and causing delivery time problems. (T 90-95) Complainant also told Horner, "I'm tired, you know, I need rest." (T 95) Complainant testified that Horner told him the current load had to arrive in Dickson, Tennessee by 7:00 a.m. on November 18, 1999 or he would receive a "service failure," a negative report that appears on a driver's record maintained by Respondent. Complainant testified that he told Horner his logs would not "support" this shipment, and she replied that "[he] was a professional driver . . . [and he] should know what to do with the logs." (T 96-97) Complainant testified that he interpreted Horner's statement to constitute her instruction that he falsify his logs so that it would appear he made his delivery without violating the 10-hour rule. (T 90-103) Complainant then proceeded to drive to Dickson, Tennessee. He testified that he stopped only for a three-hour break around 12:00 a.m. on November 18. (T 103)

Complainant further testified that he arrived at the receiver in Dickson, Tennessee at 7:00 a.m. on November 18. While waiting to be unloaded, Complainant received a preplan for another shipment, which required that he pick up a load in Fulton, Kentucky about 1:00 p.m. that day. (T 104; RX 1, p. 35) Complainant informed Horner that there was no clear indication when he would be unloaded at Dickson since the operation was running very slowly and he might not be able to pick

---

[2]In addition, Complainant states that violations of the regulations contained in 49 C.F.R. § 301 *et seq.* occurred on November 5-8, 1999. However, he does not contend that he engaged in protected activity with regard to those violations. (Complainant's Brief, p. 23-25; T 73)

Further, in his responsive brief Complainant states that Respondent "blacklisted" him in his post-December 10, 1999 efforts to find other employment. (Complainant's Responsive Brief, p. 17) However, this was not alleged in his complaint nor brought up at the hearing. As the matter was not litigated, I can make no determination regarding this allegation.

up the Fulton load by 1:00 p.m. Horner told Complainant to contact J.B. Hunt's Detention Office and report his situation, and she would work on changing the new preplan. (T 107; RX 1, p. 35) Complainant's truck was being unloaded around 12:05 p.m. He received a revised preplan arrived about 12:06 p.m. on November 18. The revised preplan required Complainant to pick up the load in Fulton, Kentucky by 1:00 p.m. on November 18 and deliver the shipment to Toledo, Ohio by 12:00 p.m. on November 19. (T 112-113) Complainant then telephoned Horner twice to change this preplan because he did not believe he could get to Fulton by 1:00 p.m. Complainant testified that during one of the telephone conversations with Horner, he explained that he was tired and hungry, and had driven all night the previous evening. Complainant testified that he refused to accept the Kentucky preplan because he needed to get some rest. Complainant testified that Horner told him to pick up the load in Kentucky and to delay taking a rest. Complainant further testified that Horner told him that if he failed to accept the Kentucky preplan, his action would be considered to be the same as quitting. (T 122-124)

Horner disagreed with Complainant's version of these events. Horner testified that during one of these telephone conversations Complainant complained that he wanted to take a shower and a rest, but he did not mention that he was out of driving hours. (T 997) Horner also denied that she told Complainant to adjust his logs to show compliance with the regulations. (T 1228) Further, Horner testified that she informed Complainant that she would work on arranging a switch for him after he picked up the load in Fulton. (A "switch" or a "swap" is a procedure in which J. B. Hunt arranges to remove the driver from a delivery or have the driver switch loads with another driver. (T 843) Horner further testified that she told Complainant it was no longer mandatory that he pick up the Fulton load by 1:00 p.m. and that after he left Fulton he should drive to the nearest truck stop and wait there until another J. B. Hunt truck arrived, and switch loads with the other driver. She testified emphatically that she told Complainant he was not to continue driving after picking up this load. (T 1012) Horner also testified that during this phone conversation, Complainant told her to "grow up" and that "she wasn't his mother." At this point Horner hung up the phone on Complainant. (T 1013; RX 13)

Additionally, at about 1:20 p.m. on November 18, the Baltimore terminal sent Complainant an OBC message acknowledging that the Fulton load needed to be switched out to another driver in order to meet the delivery deadline of 12:00 p.m. on November 19. Between 1:20 and 2:00 p.m., the Baltimore terminal sent several OBC messages to Complainant requesting that he inform the terminal of his status so that necessary arrangements could be made to deliver the load. (RX 1, p.37)

After his conversation with Horner on November 18, Complainant telephoned Willie Johnson, who was employed in Respondent's Employee Relations Department at the corporate headquarters in Arkansas. Complainant informed Johnson of the situation with the Fulton preplan and his delay at the receiver that morning. He also told Johnson that he had been harassed by Horner. (T 125, 128, 130) Johnson then connected Complainant with Pfennig. (T 136) Although Complainant did not testify about whether Horner had informed him of the switch, Complainant testified that Pfennig stated that arrangements would be made for Complainant to swap the load with another driver after he picked it up. Complainant testified that Pfennig told him that if he did not pick up this load, he

would be brought back to Baltimore and the situation would be resolved in a "negative manner." Consequently, Complainant decided to pick up the load. (T 145)

At 6:26 p.m., when Complainant was on his way to Fulton, the Baltimore terminal sent him a message asking how many hours were remaining (under the regulations) for him to drive after he picked up the load in Fulton. Complainant arrived in Fulton at 7:23 p.m. on November 18. (RX 1, p. 39) At 8:25 p.m., Complainant responded to the query, stating , "Have not accurately computed [hours] yet but I know I can make Louisville, KY tonight." (RX 1, p. 39) Rather than switching the Fulton load, Complainant proceeded to drive through the night and arrived in Dayton, Ohio the next morning. The record contains no explanation by Complainant of the reason that he did this. The next OBC message from Complainant was sent on 2:23 a.m. on November 19. Complainant wrote: "I am presently located in Dayton, Ohio . . . No info provided as to swap . . . Is a swap going to take place?" Subsequently, a swap was arranged at that location. (RX 1, p. 40) Horner reiterated during her testimony that she had instructed Complainant to wait near Fulton, Kentucky for a switch. (T 1013) Horner testified that nobody told Complainant to drive to Dayton, Ohio, and she did not learn that the swap had not taken place near Fulton, Kentucky until she arrived at work the morning of November 19. (T 1019)

Susan Dietz, a manager in the Compliance Office, testified that her job consisted of monitoring truck driver activity to assess compliance with relevant regulations. At the end of Complainant's employment with Respondent, Dietz reviewed Complainant's history of load assignments ("load histories"), OBC messages, and OBC locator reports. Dietz pointed out that the satellite records show that Complainant's truck was stationary for almost as much time as it was moving, indicating that Complainant was resting or off duty. (T 483-492; RX 7, pp. 137-139) Dietz determined that, under the regulations, when Complainant arrived at the receiver on November 18 he could be on duty, but could not drive until he had been off duty for a few hours. (T 493; RX 7, p. 139) Dietz testified that Scott would have had sufficient hours on November 18 to complete his assigned preplan. (T 483-484)[3]

2. Events of December 4-10, 1999

On December 4, 1999 Complainant picked up a load in Maine that was scheduled for delivery in Richmond, Virginia on December 6, 1999. (T 180-181; RX 1, p.75) While in route, Complainant stopped at the Baltimore terminal on December 6, to attend a scheduled interview with Horner regarding an accident Complainant had on December 2, 1999. When Complainant arrived, he and Horner had an argument, because she asserted that the accident interview was not scheduled for that day and refused to conduct the interview. Complainant then telephoned Respondent's Safety Office.

[3]Dietz also testified that Complainant's logs could indicate a violation of the 10-hour rule on November 17. However, the OBC locator record did not provide any evidence of a violation on this date. (T 551, 566) Additionally, Complainant admitted that he falsified his logs during his entire employment with Respondent. (T 401-404, 468)

As a result, the Safety Office ordered Horner to interview Complainant. Complainant testified that Horner then told him, "You're in trouble, I'm going to get you." (T 184-192)

Complainant testified that the next day, December 7, Horner informed him, via the OBC, that his truck was being scheduled for B-service in Baltimore. (B-Service is J.B. Hunt's inspection of trucks conducted on vehicles every 32,000 to 34,000 miles. (T 885)) Horner told Complainant that after he drove to Georgia, he would be routed back to Baltimore for the B-service. (T 210; RX 1, p. 78) Complainant responded to Horner, that "I need a quick [appointment] in Baltimore before the week is out anyway . . . so I guess we can cover all bases at one time." (RX 1, p. 78)

On December 8, Complainant delivered a load in Georgia, arriving at approximately 6:19 a.m., and then waited for the truck to be unloaded. (T 217; RX 1, p. 79) Complainant informed Horner that the receiver was making him wait and would unload the truck at approximately 12:00 p.m. (RX 1, p. 78) After some time had passed, Complainant informed Horner that the receiver was further delaying the unloading time. Complainant was unhappy about this, and sent the following OBC message to Horner:

> We need to come up with an answer as to what to do with this load. I will stick this load out and comply with whatever reasonable solution you come up with. This is going to be maybe a thousand mile week for me. I can't afford this job.

(RX 1, p.80) Shortly after sending this message, Complainant received a preplan requiring him to pick up a load in northern Atlanta and deliver it in Kentucky the following day, December 9. (T 223) Complainant informed Horner that he could not make this delivery and still attend the personal appointment he had scheduled in Baltimore. (T 223) Horner was confused about why Complainant had made an appointment in Baltimore. The following OBC messaging then took place:

> COMPLAINANT:
> Tori I told you as soon as you advised me you were routing me back to Baltimore. I answered that in the [message] I just sent you (in clear and concise words) but as you referred to it as a speech I guess you didn't see the need to read it. So I say again! The only reason I made the appointment in Baltimore was because you advised me that you was [sic] routing me back there for a B-service and "could not route me any place else."
>
> HORNER:
> I meant after [your preplan] to Kentucky I would route [you] to [Baltimore] not directly after this dispatch . . . I write all time off dates on my calender & the only one I have for [you] is for 12/30 . . . So you will need to reschedule [your personal appointment] for the time that [you] will be here & I won't know that until tomorrow [morning].

> COMPLAINANT:
> Tori! Enough OK! Here are your words exactly as they appear [in a prior message]: "After your delivery to Georgia, I am routing you back to Baltimore . . . to have a B-service done. You're getting close." Enough OK! If you don't want to take my word for it you can confirm it with the Atlanta terminal manager after I get unloaded. I shall attempt to make arrangements there.
>
> HORNER:
> No [you're] not!! [You] don't make [B-service] arrangements, I do!! If [you] go behind my back & go to Atlanta shop, I will route [you] to [Baltimore] to have some time off & I mean it! I can't help it that there is no other freight from Georgia straight to [Baltimore] . . . We need to take what we can get . . . So you will run the preplan & then I will route [you] in for service . . . It will be done this way & no other!!! Do [you] understand??
>
> COMPLAINANT:
> You misunderstand I am not making plans for [B-service]. I am trying to find out why my Fleet Manager is making false official statements in the performance of her duties which are costing me money and this company money and then pressuring, harassing and threatening me (in violation of not only this company's policies but a violation of state and federal laws) as though I did or said something wrong . . .

(RX 1, pp. 81-82)[4]

After this discussion, Complainant telephoned Johnson to complain about Horner. Complainant testified he told Johnson that he was tired and not getting enough rest and that Horner was supposed to route him to Baltimore. (T 238-239) Complainant explained that he had driven all night and was required to have a rest break. (T 241-242) Complainant testified that Johnson connected Complainant to Pfennig and Complainant informed Pfennig that he was due a rest break, but he did not discuss specific amounts of hours that he had been on duty or driving. (T 246-247) Complainant testified that Pfennig told him that he would not be routed back to Baltimore until after he delivered the next load to Kentucky, as previously scheduled. Complainant refused to do this and Pfennig instructed Complainant that he would be routed back to Baltimore immediately to clean out his truck. (T 250) According to Complainant, he was routed back to Baltimore, and forced to leave Respondent's employment on December 10, 1999. In a subsequent discussion with Johnson, Complainant testified that Johnson told him, "[Johnson] was going to let the record show that I quit rather than being fired." (T 254-255)

---

[4]Approximately one-half of this OBC conversation has been omitted because it consists of squabbling between Complainant and Horner that does not pertain to his driving.

Pfennig testified that the conversation on December 8 involved a discussion about Complainant's desire to quit because he was frustrated with many of J. B. Hunt's policies. (T 841) Pfennig testified that as a result of Complainant decision to quit, Pfennig began to make arrangements to route Complainant back to Baltimore. (T 1182-1183)

Johnson provided an affidavit in which he stated that he never spoke with Complainant on December 8, 1999. Johnson also stated that he never advised Complainant that it would be better if Complainant quit. (RX 2) It was Johnson's recollection that he was informed on December 13, 1999 that Complainant quit on or about December 10, 1999. (RX 2, p. 2) However, Johnson's notes indicate that he did speak with Complainant and Pfennig on December 8. Johnson's notes indicate that Complainant wanted to attend his appointment in Baltimore and did not want to complete the preplan assigned on December 8. (RX 3, pp. 334-335)

Dietz testified that she again found no evidence that Complainant did not have the necessary hours to complete the preplan assigned on December 8. (T 494) Dietz testified that the OBC locator records and OBC messages indicate that starting on December 7 Complainant drove 10 hours to Lavonia, Georgia. (T 498) Following this, Complainant did not drive for approximately six hours. (T 498) Complainant then drove for another two hours and arrived at the receiver in Georgia on December 8. (T 498-499)

## C. Discussion

To prevail on a claim, the employee must prove by a preponderance of the evidence that he or she engaged in protected activity; that his or her employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against the employee; and that there is a causal connection between the protected activity and the adverse action. Clean Harbors Environmental Services, Inc. v. Herman, 146 F.3d 12, 21 (1st Cir. 1998); Yellow Freight Systems, Inc. v. Reich, 27 F.3d 1133, 1138 (6th Cir. 1994); Moon v. Transport Drivers, Inc., 836 F.2d 226, 228 (6th Cir. 1987). When a case is tried fully on the merits, as this case was, there is no need to determine whether the employee presented a *prima facie* case and whether the employer rebutted that showing. United States Postal Service Board of Governors v. Aikens, 460 U.S. 709, 713-14 (1983); Pike v. Public Storage Companies, Inc., 98-STA-35 (ARB Aug. 10, 1999); Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia, 97-STA-30 (ARB July 8, 1998). Although a *pro se* complainant may be held to a lesser standard than legal counsel with regards to matters of procedure, the complainant must still carry the burden of proving the necessary elements of discrimination. Flener v. H.K. Cupp, Inc., 90-STA-42 (Sec'y Oct. 10, 1991)

### 1. Protected Activity

Complainant alleges that he engaged in protected activity when he refused to accept illegal dispatches and complained about unsafe conditions on November 16-19, and December 4-10, 1999. (Complainant's Brief, p. 24)

The Act provides:

> A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because . . .
>
> (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C.A. § 31105(a)(1) (1997).

**(a) Complaint pursuant to § 31105(a)(1)(A)**

Internal complaints to any level of management have consistently been held to be "complaints" under 49 U.S.C.A. § 31105(a)(1)(A). Zurenda v. J & K Plumbing & Heating Co. Inc., 97-STA-16 (ARB June 12, 1998); Doyle v. Rich Transport, Inc., 93-STA-17 (Sec'y Apr. 1, 1984). Complaints do not have to refer to particular safety standards in order to be protected. See Davis v. H.R. Hill, Inc., 86-STA-18 (Sec'y Mar. 1987), slip op. at 5-6; Nix v. Nehi-R.C. Bottling Complainant ., 84-STA-1 (Sec'y July 31, 1984). Further, the alleged safety violations need not be proven in order for the complaints to be considered protected activity. Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-57 (6th Cir. 1992).

The pertinent regulations of the U. S. Department of Transportation are set forth below:

49 C.F.R. § 396.3(a) (1999)

> General. Every motor carrier shall systematically inspect, repair, and maintain ... all vehicles subject to its control.
>
> (1)Parts and accessories on trucks shall be in safe and proper operating condition at all times. These include those specified in part 393 of this subchapter and any additional parts and accessories which may affect safety of operation, including but not limited to, frame and frame assemblies, suspension systems, axles and attaching parts, wheels and rims, and steering systems.

49 C.F.R. § 395.3(a)(1) (1999)

> ... [N]o motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive ... [m]ore than 10 hours following 8 consecutive hours off duty....

49 C.F.R. § 392.3 (1999)

> ... [A] motor carrier shall not require or permit a driver to operate a commercial motor vehicle while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle....

In the instant case, Complainant frequently complained to Horner, Pfennig, and Johnson about "not getting enough rest" and that he did not have available hours to complete his runs on the relevant dates in November and December, 1999. (T 77, 81, 122, 997) The record also shows that in November and December, Complainant complained about potential safety violations when he reported steering problems and air leaks. These complaints about mechanical problems occurred at various times during Complainant's employment, not only on the dates in November and December that were the focus of the prior recitation of facts. (T 60-67, 884, 910; RX 1, p. 56) There is also evidence that Complainant complained in early November about not having blankets for his sleeper berth. (T 41) Horner recalled that she had numerous discussions with Complainant about these problems throughout Complainant's employment. Although most of these complaints were very general, I find that they related to potential safety violations under the regulations set forth at 49 C.F.R. § 301, *et seq*. See Davis, 86-STA-18 (Sec'y Mar. 1987). Therefore, I find that the complaints about not getting enough rest, possible maximum hour violations, and potential vehicle problems on November 16-19 and December 4-10, as well as the complaints on other dates, constitute protected activity. Finally, I find that Complainant engaged in protected activity when he complained to Horner and Pfennig about not having blankets for his sleeper berth. (Complainant's Brief, pp. 23-25) Despite the fact that Complainant does not specifically articulate that this constitutes protected activity, the regulations support such a determination. See 49 C.F.R. § 393.76(e)(1).

**(b) Refusal to work pursuant to § 31105(a)(1)(B)**

With regard to the events of November 16-19, Complainant testified that he voluntarily drove while the vehicle had possible safety problems or while he did not have available driving hours. (T 147-155) However, an employee cannot be considered to have refused to operate a vehicle under § 31105(a)(1)(B) when the employee voluntarily elected to drive in violation of potential safety violations. See Zurenda v. J & K Plumbing & Heating, Inc., 97-STA-16 (ARB June 12, 1998). Consequently, Complainant has failed to establish that he engaged in protected activity by refusing to drive his truck in violation of potential safety violations on November 16-19, 1999.

Complainant also failed to show that he refused to operate his vehicle for safety reasons during the events of December 6-8, under either provision of § 31105(a)(1)(B). Under § 31105(a)(1)(B)(i), the complainant must show that operating the vehicle would have caused an actual violation of a motor carrier safety regulation; it is not sufficient that the driver had a reasonable belief about a violation. Yellow Freight Sys., Inc. v. Reich, 38 F.3d 76(2d Cir. 1994); Yellow Freight Sys. Inc, v. Martin, 983 F.2d 1195, 1199 (2d Cir. 1993); Williams v. Carretta Trucking Inc., 94-STA-07 (Sec'y Feb. 15, 1995).

Complainant has not established that an actual violation would have occurred on December 8 based on the 10-hour rule or the rules pertaining to fatigue. 49 C.F.R. §§ 392.3, 395.3(a)(1). Complainant testified extensively about being coerced into driving without rest and that Horner told him to falsify his logs to reflect driving within the 10-hour rule. (T 90-124, 128-140) However, Complainant's account of these events is substantially outweighed by other record evidence. At the outset, I discount Complainant's recitation of these events since Complainant testified that he falsified his driving logs from the very outset of his employment with Respondent. Complainant also conceded that nobody at J. B. Hunt told him to do this. (T 401-404, 468) Complainant 's ongoing falsification of his driving logs – a serious violation of the federal regulations – casts doubt on the veracity of all of his testimony that is contradicted by other evidence or by logic alone. Further, Dietz reviewed the OBC locator and OBC communications records for the time period from December 6-8 and found that there was no violation of the 10-hour rule on these dates. (T 490-499) In addition, Dietz's testimony that Complainant was not in violation of the 10-hour rule is supported by the OBC locator record which shows that Complainant's truck stopped for significant periods of time during that period. (RX 7)[5]

Additionally, a review of Complainant's load histories for late November through December do not show an excessive amount of load assignments that would support Complainant's allegations

---

[5]RX 1 contains a printout of Complainant's OBC communications. "USERID" indicates who is logged on at the Baltimore terminal's OBC. For example, "HORNET" indicates Tori Horner was logged on at the Baltimore terminal. The "TRAN" column indicates who the sent the particular message. Under this column, a letter "H" preceding a number indicates a user at the Baltimore terminal sent the message. A letter "O" preceding a number indicates the truck driver sent the message. (T 97-99) RX 7 contains the OBC locator log for the relevant dates of Complainant's employment. Starting on page one, the first two columns on the left side show the date and time that the satellite recorded the vehicle's location. The next two columns show the vehicle's proximity to the nearest town or city and the last column shows the latitude and longitude of the truck. Unlike RX 1, no message traffic between the driver and the home terminal is recorded on the OBC locator log.

Throughout Complainant's briefs, he alleges that Respondent falsified records and deliberately destroyed damaging documents. However, I find there is no credible evidence that this occurred.

of fatigue. (RX 8) Starting on November 27, Complainant was assigned a 394-mile trip, followed by a 521-mile trip on November 30, a 997-mile trip on December 1, a 654-mile trip on December 3, a 143-mile trip on December 6, and a 530-mile trip on December 7. (RX 8) This evidence indicates that Complainant was being assigned both long and short trips approximately every two days. I do not consider this to be an excessive amount of driving that would cause fatigue. I therefore find that Complainant's testimony about "not getting enough rest" is contradicted by the other evidence. Based on this evidence and Complainant's general lack of credibility (discussed above), I find that he has failed to establish that he suffered from fatigue. See Cortes v. Lucky Stores, Inc., 96-STA-30 (ARB Feb. 27, 1998) (complainant's self-serving testimony of fatigue was unsupported by the greater weight of contrary evidence). Based on the foregoing I further find that Complainant has failed to establish that a violation of the regulations regarding the 10-hour and fatigue rules would have occurred had Complainant accepted the preplan assigned to him on December 8. 49 C.F.R. §§ 392.3, 395.3(a)(1).

Complainant argues that he refused to accept the December 8 preplan for the additional reason that his truck was overdue for Respondent's B-service, in violation of the motor carrier's duty to inspect and make all vehicles safe, pursuant to 49 C.F.R. § 396.3(a)(1). Complainant contends that the vehicle was driven 32,274 miles since the last B-service was performed on it and that thus it was "overdue for B-service." (Complainant's Brief, pp. 22-23). However, CX 13 indicates that B-service was performed on the truck on September 11, 1999, when the odometer reading was 32,486 miles and that as of December 9, 1999, the odometer reading was 63,972 miles – a difference of only 31,486 miles. Moreover, under Respondent's B-service policy, this inspection can be performed after the vehicle has been driven between 32,000 and 34,000 miles. Thus, the truck could have been driven another 2,500 miles before B-service was required. Further, the regulations do not require that motor carriers keep to a regimented vehicle inspection schedule. Section 396.3(a)(1) only requires that motor carriers systematically inspect, maintain, repair, and otherwise make all vehicle operations safe. There is no reason to conclude that Respondent's B-service inspection every 32,000 to 34,000 miles caused a safety problem or is violative of this regulation. Certainly, Complainant has not established that service at those intervals violates any federal regulation. Therefore, I do not find that an actual violation of § 396.3 would have occurred on December 8 if Complainant had accepted the assigned dispatch.

Complainant has also failed to present any evidence that he refused to operate his truck based on a reasonable apprehension of a safety violation on December 8. 49 U.S.C.A. § 31105(a)(1)(B)(ii). Under § 31105(a)(1)(B)(ii), the complainant must demonstrate

> that a reasonable individual in circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105(a)(2); Williams v. Carretta Trucking Inc., 94-STA-07 (Sec'y Feb. 15, 1995); Brunner v. Dunn's Tree Service, 94-STA-55 (Sec'y Aug. 4, 1995). Complainant maintains that his OBC argument with Horner on December 8 constitutes a refusal to work based on a safety violation because his truck was going to be overdue for B-service. (Complainant's Brief, pp.16-17; T 719) However, I find that this argument was unrelated to a safety violation, but rather that it was caused by Complainant's desire to return to Baltimore for a personal appointment he had arranged there. (RX 1, pp.81-82) Complainant referred to this appointment early in the argument, and his OBC writings became more emphatic after Horner told him to reschedule his appointment. Although Complainant mentioned B-service during the argument, Complainant was quoting Horner's earlier message. (RX 1, pp. 81-82) At the hearing, Complainant admitted that he did not know what B-service was; nor was he aware that his vehicle needed B-service. (T 811-812) Complainant also admitted that Respondent informed him that he could pull over for service at any time and did not have to continue driving if he felt his vehicle was unsafe for any reason. (T 716) Furthermore, Complainant did not indicate in his testimony that the vehicle was still experiencing problems with steering or that there were any other service problems during the December 6-8 period. Therefore, I find that Complainant did not have a reasonable apprehension of a safety violation because B-service was needed or for any other reason. § 31105(a)(1)(B)(ii).

I also find that Complainant did not have a reasonable apprehension of a safety violation based on fatigue or violating the 10-hour rule. 49 C.F.R. §§ 392.3, 395.3(a)(1). Complainant testified he informed Johnson and Pfennig that he refused to accept the assigned preplan on December 8 because he needed a rest break and had been driving all night. (T 238-242) However, the OBC locator logs show that Complainant had not been driving consistently on December 6-8 and that he had frequently stopped for breaks. (T 494-498; RX 7, pp.154-156) Further, based on her review, Dietz concluded that Complainant would not have violated the 10-hour rule if he had completed the assigned dispatch on December 8. Additionally, as previously mentioned, a review of Complainant's load histories for late November through December does not reveal excessive driving assignments that would support Complainant's allegations of fatigue. (RX 8) Further, Complainant generally lacks credibility based on his admission that he continually falsified his logs, and for this reason I discount his testimony regarding his driving abilities on these dates. An additional reason to be suspicious of Complainant's assertion that he was concerned about safety matters is that he appears to have been searching for an excuse to avoid the preplan so that he could attend his appointment in Baltimore. Based on the foregoing, I find that Complainant has failed to establish that he had a reasonable apprehension that a violation of 49 C.F.R. § 392.3 or § 395.3(a)(1) would have occurred if he drove at that time.

Based on the foregoing, I find that Complainant has established that he engaged in protected activity under § 31105(a)(1)(A) by complaining about potential safety violations to Horner, Pfennig, and Johnson. However, I find Complainant has failed to show that he engaged in protected activity under § 31105(a)(1)(B) when he refused to accept his assigned dispatch on December 8, 1999.

## 2. Adverse Action Motivated by Discriminatory Intent

Complainant must next establish that Respondent took adverse action against him. Any employ-ment action by an employer which is unfavorable to the employee's compensation, or terms, conditions, or privileges of employment can constitute adverse action. Long v. Roadway Express, Inc., 88-STA-31 (Sec'y Mar. 9, 1990). Complainant alleges that J.B. Hunt discriminated against him by terminating his employment. Additionally, although not specifically alleged to constitute adverse action, I infer from Complainant's testimony that he was of the belief that J.B. Hunt discriminated against him through harassment by Horner and by the J.B. Hunt disciplinary form issued on December 10, 1999.[6]

Complainant maintains that he was fired by Pfennig on December 8, 1999 for refusing to accept the preplan assigned to him that day. (Complainant's Brief, p. 25) Respondent contends that Complainant voluntarily quit on December 10, 1999. (Respondent's Brief, p. 21)

As set forth above, Pfennig contradicted Complainant's version of the events of December 8 in testifying that in their conversation on that date Complainant stated that he was quitting because he was frustrated with Respondent's policies. (T 841) After their conversation, Complainant was assigned to take a load from Rincon, Georgia to the Baltimore terminal. (RX 1, pp.84-86; RX 7, pp.156-157) Pfennig testified that, contrary to what happened with Complainant, if a driver were fired rather than having quit, he would be routed back to his home terminal immediately and would not be assigned another load. (T 1221)

Complainant's explanation of why Respondent's record shows that he quit rather than being fired is that when he later spoke with Johnson, the latter stated that he would allow the record to show that Complainant voluntarily quit. In this testimony, Complainant did not indicate that he was opposed to Johnson's suggestion. (T 254-255) Subsequently, however, Complainant testified,

> I also addressed in there to Mr. Johnson that I did not care what the record reflected as far as whether I quit or whether I was terminated, as long as it was the result of Mr. Pfennig's action on the 8th of December 1999.

(T 268) J .B. Hunt's records show that Complainant quit. Johnson explained that he was informed on December 13 that Complainant had quit on December 10. (RX 2) Furthermore, in a summary of events that Horner prepared after Complainant's employment ended, Horner stated that when Complainant was in Georgia, he became "very irrate" when she told him he would be routed in the opposite direction from Baltimore, and "At that time told me that I needed to route him back be-cuz [sic] he was quitting due to the mistreatment that he apparently thought we were giving him." (CX 8)

---

[6]Nothing in Complainant 's testimony or his brief indicates that he believes that he was subjected to adverse action by being assigned low-mileage loads. Nor do I find that the record supports such a finding.

Additionally, other J. B. Hunt records show that Complainant quit on December 10 because he was dissatisfied with company policy and they do not mention any discipline problems that would support Complainant's contention that he was fired. (RX 12) Respondent's assertion that Complainant quit because of his dissatisfaction with company policies is also supported by the numerous complaints Complainant made regarding delays at shippers and receivers. (T 81, 90-95, 104-112, 217 ) Complainant also expressed his frustrations with company policy on December 8 when he stated that he was not getting enough driving time and, "I can't afford this job." (RX 1, p. 80) This evidence supports the finding that Complainant quit on December 8, 1999.[7]

In conclusion, I find that Pfennig's testimony that Complainant quit, and was not discharged, on December 8, 1999 is more credible than Complainant's contrary version of their conversation. As previously discussed, Complainant's admitted continual falsification of his driving logs, unsolicited by Respondent, casts doubt on his credibility. Independent of Complainant 's general lack of credibility, I also find that Complainant's second version of his conversation with Johnson does not have the ring of truth. Rather, in this testimony he sounds more like a trained advocate crafting a version of events that will explain away the defects of his case while admitting only what he is unable to deny. Indeed, even in this version, Complainant concedes that he discussed with Johnson that the termination of his employment should be recorded as a quit. Moreover, Pfennig's testimony that Complainant quit is supported by Respondent's documents which record that he quit. Although I do not give undue weight to these records, as they could be considered self-serving, they constitute some evidence of the actual nature of the conclusion of Complainant's employment. In sum, I find that Complainant has failed to establish that Respondent discharged him.

I turn next to the question of whether the circumstances surrounding Complainant's decision to quit his employment with Respondent transform that act into a constructive discharge. A constructive discharge occurs where working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. Hollis v. Double DD Truck Lines, Inc., 84-STA-13 (Sec'y Mar. 18, 1985). It is not necessary to show that the employer intended to force a resignation, but only that the employer intended to compel the employee to work in intolerable conditions. Hollis,84-STA-13 (Sec'y Mar. 18, 1985). Here, Complainant asserts that he was harassed and threatened by Horner and Pfennig throughout his employment. Testimony of the employee may satisfy the adverse action element, if it is not contradicted and overcome by other evidence. Ass't Sec'y & Brown v. Besco Steel Supply, 93-STA-30 (Sec'y Jan. 24, 1995). However, it is not sufficient to show that harassment occurred; the employee must prove by a preponderance of the evidence that he was harassed because he or she engaged in protected activity. Tierney v. Sun-Re Cheese, Inc., 2000-STA-12 (ARB Mar. 22, 2001).

---

[7]I find that after Complainant told Pfennig he was quitting on December 8, Respondent arranged for Complainant to drive a load back to the Baltimore terminal. I infer that it was understood by both Complainant and Pfennig that Complainant's employment would cease upon his delivery of the vehicle in Baltimore, which occurred on December 10. This arrangement was beneficial to both Complainant and J. B. Hunt: Complainant was able to travel home and to get paid for doing it, and Respondent got a delivery of freight.

I find that Complainant has failed to establish that he was harassed because of his protected activity. Rather, Complainant's problems with J.B. Hunt began at the very outset of his employment, when the company failed to assign him work for a full week after he was told that he was hired. Complainant testified that he was supposed to receive a driving assignment on October 28, but that he was forced to wait until November 5 for his first work. Additionally, there was friction between Complainant and Respondent as soon as he began to drive. When Complainant was finally assigned to a truck, he was immediately scheduled to deliver a load in Claire, Michigan, without the opportunity to obtain needed bedding supplies in Baltimore. (T 26, 41) Complainant delivered this load, but continuously requested routing back to Baltimore so that he could get his bedding supplies. Nevertheless, Complainant was required to make several deliveries before he was finally routed to Baltimore and he was able to pick up his supplies. During this time, Complainant never mentioned hours violations or problems with fatigue, but rather expressed to Pfennig his displeasure about not having bedding supplies. (T 41-73) Pfennig and Horner also recalled that Complainant wanted to quit early in his employment when he was initially assigned a dirty truck, but they both persuaded him to stay. (CX 8, 9)

Adding to Complainant's discontent was the fact that there was what could be called a "personality conflict" between Complainant and Horner from the start of his employment. (RX 6; T 432-434) This may be best exemplified by Horner's testimony that in their telephone conversation on November 18, Complainant told her to "grow up" and said that "she wasn't his mother," and she hung up on him. (T 1013; RX 13) In a report dated February 8, 2000, Johnson noted that Complainant felt he was threatened and humiliated by the way Horner treated him. Johnson's review of Complainant's tenure with the company reiterated the OBC exchange between Horner and Complainants on December 8, in which they argued about routing Complainant back to Baltimore so that he could attend an appointment. (CX 10) Johnson also reported that Complainant was upset over how Respondent handled his accident on December 2, since the evidence showed Complainant was not at fault. In a summary to this report, Johnson reported that Complainant sought an apology for the way he was treated. (CX 10) Johnson noted that the OBC messages indicated there were several communication breakdowns between Complainant and Horner and instances where Johnson faulted Horner for not using tact when communicating over the OBC. (CX 10) In an internal memo dated February 12, 2000, John McGowan acknowledged that Respondent failed to build a good working relationship with Complainant from the beginning.[8] Like Johnson, McGowan cited Horner's lack of professionalism in her OBC communications as a source of strain on Complainant's relationship with Horner. (CX 11)

A pattern of ongoing difficulty between an employee and management that leads to termination of employment does not always amount to a constructive discharge. See Forrest v.

[8]Complainant did not establish McGowan's position with Respondent. However, as Respondent did not controvert the introduction of this exhibit, I infer that McGowan was a representative of Respondent who was authorized to make such statements. Further, because Complainant is a lay person appearing without an attorney, I do not hold him to the standards applicable to an attorney. Flener, 90-STA-42 (Sec'y Oct. 10, 1991).

Transwood Logistics, Inc., 01-STA-43 (ARB Jan. 25, 2002). Such a history alone does not carry the employee's burden to establish that the constructive discharge resulted from the employer's discriminatory motive. Forrest, 01-STA-43 (ARB Jan. 25, 2002) Here, the evidence shows that Complainant and Horner did not get along and had a number of arguments over various company practices, rather than Complainant's protected activity. Although Complainant alleges that Horner told him to falsify his logs during a phone conversation on November 17, Horner denied this and, as noted, Complainant admitted that he falsified his logs from the start of his driving for Respondent. (T 468) Additionally, Respondent took steps to switch Complainant out of his load on November 18-19 when Complainant complained about not getting enough rest. (T 1012; RX 1, p. 37) Respondent's efforts to accommodate Complainant by attempting to switch his load to another driver when he reported he was fatigued undercuts Complainant's argument that he was forced to work under intolerable conditions imposed by management. Based on the foregoing, I find that Complainant has not established by a preponderance of the evidence that his arguments with Horner, or any other aspect of his working conditions constituted harassment or threats by Respondent that were in response to his having engaged in protected activity. Thus, I find that Complainant has failed to establish that the termination of his employment resulted from a constructive discharge.

I also find that the December 10, 1999 disciplinary form written by Horner constitutes adverse action. (RX 13) Discipline reports issued by an employer against an employee can constitute adverse action. Nolan v. AC Express, 92-STA-37 (Sec'y Jan. 17, 1995). However, where an employee produces evidence that indicates he or she has suffered adverse action, the employee bears the further burden of proof to establish that the employer had a discriminatory motive for taking the adverse action. Shute v. Silver Eagle Company, 96-STA-19 (ARB June 11, 1997). In Galvin v. Munson Transportation, Inc., 91-STA-41 (Sec'y Aug. 31, 1992), the employee achieved his burden of showing adverse action (i.e., that he was compelled to quit), but he failed to show that the employer's conduct was in retaliation for his protected activity, and it was found that the employer's actions did not violate the whistleblower statute. Here, Horner wrote a discipline report criticizing Complainant's attitude and poor performance on November 18 and December 8. Horner specifically cited the incident on November 18 when Complainant told her to "grow up," and their argument on December 8. (RX 13) As noted, Horner and Complainant had numerous disagreements and arguments. And there is no indication that this report was in retaliation for protected activity. (RX 12) In light of the above, I find that Complainant has failed to carry his burden of proof to establish that the discipline report was in retaliation for his having engaged in protected activity.

## VI. CONCLUSION

I find that Complainant engaged in protected activity by complaining to Respondent about possible safety violations, but that Complainant did not engage in protected activity by refusing to drive on December 8, 1999. The refusal to drive was not based on a potential or actual safety violation but rather resulted from Complainant's desire to attend an appointment in Baltimore.

Further, I find that Respondent did not directly or constructively discharge Complainant.[9] In addition, assuming hypothetically that Respondent constructively discharged Complainant, I find that it
was not because he engaged in protected activity (see discussion in fn. 9, above). Finally, I find that Respondent did not take any other adverse action against Complainant because of his protected activity.

For the reasons stated above, I find that Complainant has failed to establish that Respondent J.B. Hunt Transport Services, Inc. violated the Act.

---

[9]Assuming *arguendo* that Complainant had been fired by Pfennig on December 8, as he contends, the evidence does not support a finding in favor of Complainant under the "dual motive" analysis. The dual motive analysis applies when an employer's adverse action against an employee was motivated by both prohibited and non-discriminatory reasons. See Price Waterhouse v. Hopkins, 490 U.S. 228, 250-58 (1989); Park v. McLean Transportation Services, Inc., 91-STA-47 (Sec'y June 15 1992). In order to establish a violation of the Act under this analysis, an employee must provide some evidence that his protected activity motivated the discharge, at least in part. If such evidence is provided, the burden shifts to the employer to establish that it would have taken the adverse action in the absence of protected activity. See Hopkins, 490 U.S. 228, 250-58.

Here, assuming that the evidence supported Complainant's contention that he was discharged by J.B. Hunt, he could argue that the termination was motivated by his refusing to drive, or by his other protected activity. See Toland v. Werner Enterprises, 93-STA-22 (Sec'y Nov. 16, 1993) (the inference of discriminatory motivation was established when the employee was fired on the same day he made safety complaints). However, Complainant's refusal to drive on December 8 was not protected activity since he was motivated by the desire to attend an appointment in Baltimore rather than by safety concerns . Further, although I have found that Complainant engaged in the protected activity of complaining about potential safety violations, whatever inference that might arise from this is rebutted by the evidence supporting my conclusion that Complainant's non-protected conduct alone justified his discharge by J.B. Hunt. For example, Complainant had several contentious disagreements with Horner in which he was uncooperative and insubordinate, especially on December 8. See Homen v. Nationwide Trucking, Inc., 93-STA-45 (Sec'y Feb. 10, 1994) (employee's insubordinate conduct was a legitimate, non-discriminatory reason for discharge). In addition, the record contains no direct evidence that Respondent harbored any animus against Complainant because of his safety-related complaints. Based on the foregoing, even if I had found that Complainant was fired on December 8, Complainant could not prevail under the dual motive analysis.

## RECOMMENDED ORDER

It is ORDERED that the complaint of Adrian R. Scott under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982, as amended, is DENIED.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. *See* 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978 (1996). Pursuant to 29 C.F.R. §1978.109(c)(2), the parties may file with the Administrative Review Board, briefs in support of or in opposition to the administrative law judge's decision and order within thirty days of the issuance of that decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule.